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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91205046
Party	Defendant Ate My Heart Inc.
Correspondence Address	BRAD D ROSE PRYOR CASHMAN LLP 7 TIMES SQ, FL 3 NEW YORK, NY 10036-6569 UNITED STATES lbuckley@pryorcashman.com, rklarberg@pryorcashman.com, tmdocketing@pryorcashman.com, brose@pryorcashman.com, tlee@pryorcashman.com, tmdocketing@pryorc
Submission	Motion for Default Judgment
Filer's Name	Lisa M. Buckley
Filer's e-mail	lbuckley@pryorcashman.com, rklarberg@pryorcashman.com, jalbrink@pryorcashman.com, tmdocketing@pryorcashman.com
Signature	/Lisa M. Buckley/
Date	08/12/2014
Attachments	Petitioner AMH's Renewed Motion for Sanctions.pdf(491211 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of U.S. Reg. No. 2,898,544 for  
GAGA PURE PLATINUM

-----X		
CHRISTINA SUKLJIAN,	:	
	:	
	:	Opposition No. 91/205,046
	:	
Opposer,	:	
	:	
v.	:	
	:	
ATE MY HEART, INC.,	:	
	:	
	:	
Applicant.	:	
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	:	
ATE MY HEART, INC.,	:	
	:	Cancellation No. 92/055,279
	:	
Petitioner,	:	
	:	
v.	:	
	:	
CHRISTINA SUKLJIAN,	:	
	:	
	:	
Respondent.	:	
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**PETITIONER ATE MY HEART, INC.'S  
RENEWED MOTION FOR DEFAULT JUDGMENT**

Petitioner/Applicant Ate My Heart, Inc. ("AMH," "Petitioner" or "Applicant"), in accordance with Rule 527 of the Trademark Trial and Appeal Board Manual of Procedure ("TBMP"), 37 C.F.R. § 2.120(g), hereby seeks an order cancelling Respondent/Opposer Christina Sukljian's ("Sukljian," "Opposer" or "Respondent") mark, GAGA PURE PLATINUM,

U.S. Reg. No. 2,898,544, and registering AMH's mark, HAUS OF GAGA, U.S. Serial No. 85/215,017.

### **PRELIMINARY STATEMENT**

AMH seeks judgment in its favor in these consolidated Opposition and Cancellation Proceedings (the "Proceedings") because after two prior sanctions motions and three admonishments by the Board to stop playing games in discovery, Sukljian thumbed her nose once again, this time failing to show up at her scheduled deposition. In the Board's June 12, 2014 Order granting AMH an extension of time to depose Sukljian to June 30, 2014, the Board presciently warned Sukljian that "[a]s noted in the Board's January 28, 2014 order, Ms. Sukljian is reminded that her failure to appear for a noticed deposition may result in entry of judgment against her." Sukljian did exactly that: she failed to appear for a noticed deposition. Respectfully, it is now time that the Board enter judgment against Sukljian and in favor of AMH in the consolidated Proceedings.

The Board has already ruled that Sukljian is precluded from relying on documents that she did not produce in discovery and facts that she did not disclose in response to interrogatories. *See* Board's January 28, 2014 Order at p. 6. Sukljian did not produce any documents or facts showing that she has been using her mark continuously since 2001, when it was filed. On the contrary, the evidence produced by Sukljian – a screen shot of her website launched in the Spring of 2012 – shows merely that *she began using her mark in commerce after AMH applied to register its mark*. Thus, the only admissible evidence shows that Sukljian abandoned the GAGA PURE PLATINUM mark, meaning that the mark should be cancelled, and Sukljian has no standing to oppose the registration of AMH's HAUS OF GAGA mark.

Now that Sukljan failed to appear for her scheduled deposition, notwithstanding the Board's express warnings, judgment shall be granted in favor of AMH in both Proceedings as a third and final sanction for Sukljan's steadfast refusal to cooperate in the Proceedings.<sup>1</sup>

### **FACTS**

The facts underlying these Proceedings are fully set forth in AMH's Petition for Cancellation, to which the Board is respectfully referred. A brief summary of the facts are provided for the Board's convenience.

Lady Gaga is a songwriter, multi-platinum recording artist, performer, Grammy winner, fashion icon and philanthropist who has achieved popularity throughout the world. Lady Gaga's corporation, AMH, is the owner of three registrations for the mark LADY GAGA and several pending trademark applications, including one for the mark HAUS OF GAGA, at issue in the Opposition Proceeding. Sukljan identifies herself as the owner of the mark GAGA PURE PLATINUM, which was filed in 2001 and registered in 2004.

Throughout the Proceedings, Sukljan has failed and refused to cooperate in discovery, prompting frequent motion practice by AMH and resulting in Board Orders, first compelling discovery and then, when the discovery was not forthcoming, imposing sanctions on Sukljan for failing to comply with the Board's Orders. Specifically, AMH made the following motions to compel discovery and for sanctions, and the Board entered the following Orders:

- On September 20, 2012 AMH moved to compel Sukljan to provide discovery because she failed to serve her initial disclosures and verified answers to AMH's first set of interrogatories and first set of document requests in the Cancellation Proceeding (granted on November 6, 2012);

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<sup>1</sup> Furthermore, judgment is also warranted because Sukljan cannot prevail given her lack of evidence of prior consistent use of the GAGA PURE PLATINUM mark.

- On December 20, 2012, AMH moved for sanctions and entry of a default judgment because Sukljian failed to comply with the Board's November 6, 2012 Order compelling her to serve initial disclosures and to respond to AMH's document requests and interrogatories in the Cancellation Proceeding. The Board had determined that entry of a default judgment was too severe a sanction to be issued at that time;
- On January 11, 2013 AMH made a motion to compel discovery in the Opposition Proceeding (granted on August 5, 2013);
- On January 23, 2013 AMH moved to compel discovery in the Cancellation Proceeding (granted on August 5, 2013); and
- On September 26, 2013 AMH moved for sanctions against Sukljian for her failure to comply with the Board's August 5, 2013 discovery Order (granted on January 28, 2014) and for Sukljian's failure to respond to AMH's notice of deposition.

In its August 5, 2013 Order, the Board directed Sukljian to serve proper discovery responses on AMH and warned her that the Board "will not tolerate game playing or evasiveness in discovery. If the Board perceives such behavior in the future, then sanctions in the form of precluding Ms. Sukljian from introducing evidence on certain issues or, if warranted, judgment against Ms. Sukljian will be considered by the Board."

In the face of the Board's warning, Sukljian still failed to comply with the August 5, 2013 Order. AMH moved for sanctions, which the Board granted. In its January 28, 2014 Order, the Board "precluded [Sukljian] from using as evidence at trial any information or documents that would have been responsive to AMH's discovery requests, but were not produced prior to AMH's filing of the motion for discovery sanctions." (Ex. G to the Klarberg Decl., at p. 6).

Although AMH also complained that Sukljian failed to confirm that she would appear for her deposition on the noticed date, the Board declined to enter judgment against Sukljian because AMH did not allege that she failed to appear for her deposition. (*Id.* at p. 7). AMH's counsel had chosen not to set a unilaterally scheduled deposition, hoping to avoid the cost of a court reporter, videographer and an overnight stay by AMH's counsel. The Board advised, however, that Sukljian's failure to appear for a noticed deposition may result in entry of judgment against her.

Notwithstanding the Board's recent admonitions in its January 28, 2014 and June 12, 2014 Orders, Sukljian failed to show up for her noticed deposition. The events leading up to her failure to appear are as follows. On June 12, 2014, the Board issued an Order granting AMH's request for an extension of time to depose Sukljian, which the Board ordered be done on or before June 30, 2014 in Albany, New York or wherever else the parties may agree. In its Order, the Board stated that, "[a]s noted in the Board's January 28, 2014 order, Ms. Sukljian is reminded that failure to appear for a noticed deposition may result in entry of judgment against her." A true and correct copy of the June 12, 2014 Order is attached as Exhibit A to the Declaration of Ryan S. Klarberg ("Klarberg Decl." or "Klarberg Declaration").

On June 17, 2014, at approximately 3:30 p.m., AMH's counsel, Ryan Klarberg, placed a telephone call to Sukljian to schedule a mutually convenient date for her deposition. Sukljian's receptionist answered the call. Mr. Klarberg identified himself and asked to speak to Sukljian specifically regarding the scheduling of her deposition in these Proceedings. Sukljian's receptionist placed Mr. Klarberg on hold for approximately 30 seconds and when she returned to the call, she said Sukljian was "in a meeting." In response, Mr. Klarberg left a message with the receptionist, providing his name, the name of his law firm and his direct telephone number. He

reiterated that the purpose of his call was to discuss a mutually convenient date for Sukljian's deposition on or before the June 30, 2014 deadline. Mr. Klarberg requested that Sukljian return his call as soon as possible. She never did. Klarberg Decl., ¶ 3.

Later that same day, June 17, 2014, at approximately 4:55 p.m., Mr. Klarberg placed a second call to Sukljian, expecting that her "meeting" had concluded by then. This time, Sukljian's receptionist reported that Sukljian was "unavailable." *Id.* at ¶ 4. Yet again, Mr. Klarberg left his contact information and requested that Sukljian promptly return his call to discuss the scheduling of her deposition. Sukljian failed to return that call as well. *Id.*

On June 17, 2014, after not having received a response from Sukljian, Mr. Klarberg served a deposition notice on Sukljian sent via FedEx to her address of record (the "Deposition Notice"). *Id.* at ¶ 5. The deposition was scheduled to take place on June 26, 2014, commencing at 10:00 a.m., to be held at the Albany Marriot, 189 Wolf Road, Albany, NY 12205, in the city in which Sukljian resides. The Deposition Notice provided that the deposition would be videotaped, as well as stenographically recorded. (Ex. B to the Klarberg Decl.).

On June 24, 2014, six (6) days after receiving the Deposition Notice, two (2) days before the noticed deposition, and three (3) business days before the Board-ordered deadline to depose Sukljian, AMH received a letter from Sukljian dated June 20, 2014 sent via USPS. *Id.* at ¶ 6. In the letter, Sukljian conceded that AMH's counsel had attempted to contact her on several occasions to schedule her deposition. Specifically, Sukljian's letter acknowledged receipt of the two telephone messages that AMH's counsel left with her receptionist on June 17, 2014. Sukljian's letter said she was not available on the scheduled date but that she would do the deposition sometime in August, two months after the Board's June 30, 2014 deadline. Sukljian requested that AMH "[p]lease confirm by mail," even though she was well-aware that the

noticed deposition was only two days away, making communication by mail impossible. (Ex. C to the Klarberg Decl.).

Upon receipt of Sukljian's letter on June 24, 2014, Mr. Klarberg called her at approximately 10:28 a.m. Mr. Klarberg was advised by Sukljian's receptionist that Sukljian was "unavailable." Klarberg Decl., ¶ 6. As before, Mr. Klarberg left his name, law firm name, direct telephone number and a message stating that because of the Board's discovery deadline, he needed to hear back from Sukljian by 4:00 p.m. that same day. *Id.* AMH would have been willing to accommodate Sukljian by rescheduling her deposition so long as the Board approved it. *Id.* However, if the parties did not speak by the end of the day on June 24, 2014, there would have been no time for AMH to obtain the Board's approval of an extension prior to the expiration of the then-current deadline. *Id.*

Not having reached Sukljian by telephone, at 12:11 p.m. on June 24, 2014, AMH's counsel e-mailed Sukljian at [info@zela.com](mailto:info@zela.com), the authorized correspondent e-mail address of record, stating:

Now it is two days before the noticed deposition . . . Unless we hear from you by close of business today to discuss an alternative deposition date in July, and agree in writing to an extension of the Board's internal deadline, which must be approved by the Board, we will appear in Albany at the designated time and place to conduct your deposition. Your failure to appear may result in sanctions . . . Considering the circumstances, the only way we will consider changing the scheduled deposition date of June 26 is if you return our phone call or respond to our email before 4:00 p.m. today. If we do not hear from you by then, we will expect your attendance on June 26. We will seek sanctions against you if you fail to appear. For the avoidance of any doubt, my direct telephone number is 212-326-0183. I am in the office all day. If you receive my voice mail, please call my colleague Lisa Buckley directly at 212-326-0483. We look forward to hearing back from you soon.

(Klarberg Decl., ¶ 7; Ex. D). Sukljian failed to respond to Mr. Klarberg's June 24, 2014 telephone call or e-mail. Klarberg Decl., ¶ 8.

Therefore, on June 25, 2014, the day before the noticed deposition date, Mr. Klarberg traveled from his firm's New York City offices to Albany. *Id.* at ¶ 9. The day of the deposition,



Mr. Klarberg arrived at the Albany Marriott hotel at 8:45 a.m. *Id.* Both the stenographer and the videographer hired by AMH for the deposition arrived at the Albany Marriot at approximately 9:15 a.m. *Id.* Mr. Klarberg set-up a video conference so that his co-counsel, Lisa Buckley, could participate in the deposition from her offices in New York City. *Id.* Mr. Klarberg and the court reporter pre-marked exhibits to streamline the deposition. *Id.* Sukljian had not arrived by 10:00 a.m., when the deposition was scheduled to start. *Id.*

At approximately 10:05 a.m., AMH's counsel went on the record (via audio and video), noting that Sukljian had not yet arrived, and stating that all present attendees would wait for Sukljian until 11:00 a.m. *Id.* at ¶ 10. (Ex. E to the Klarberg Decl.). Sukljian failed to appear. *Id.* Prior to leaving the Albany Marriot, Mr. Klarberg left his contact information at the hotel's front desk and requested that the hotel contact him if anyone arrived for the Sukljian deposition. Nobody did. *Id.* at ¶ 11.

### **ARGUMENT**

Under Trademark Rule 2.120(g)(1), if a party fails to comply with a Board order compelling discovery, the Board may order appropriate sanctions as defined in that rule and in Fed. R. Civ. P. 37(b)(2), including entry of judgment against the disobedient party. *See MHW Ltd. v. Simex Aussenhandelsgesellschaft Savelsberg KG*, 59 U.S.P.Q.2d 1477 (TTAB 2000) (entering judgment against disobedient party for repeated failures to comply with Board's orders and unreasonable delays); *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 U.S.P.Q.2d 1848 (TTAB 2000) (entering judgment against disobedient party for its dilatory conduct and willful disregard of Board's order).

Indeed, the Board on three (3) separate occasions warned Sukljian that if she failed to appear for a noticed deposition, or otherwise engaged in game playing behavior in the future,

then sanctions in the form of judgment against Sukljian would be considered. For instance, the Board's August 5, 2013 Order warned Sukljian that "the Board will not tolerate 'game playing' or evasiveness in discovery. If the Board perceives such behavior in the future, then sanctions in the form of . . . judgment against Ms. Sukljian, will be considered by the Board." A true and correct copy of the Board's August 5, 2013 Order is attached as Exhibit F to the Klarberg Declaration.

On January 28, 2014, the Board granted AMH's motion for sanctions for Sukljian's failure to comply fully with the Board's August 5, 2013 Order. A true and correct copy of the Board's January 28, 2014 Order is attached as Exhibit G to the Klarberg Declaration. As a result, Sukljian was "precluded from using as evidence at trial any information or documents that would have been responsive to AMH's discovery requests, but were not produced prior to AMH's filing of the motion for discovery sanctions." *Id.* at p. 6. Presumably, if Sukljian could show continuous use of her purported mark since 2001, she would have produced the supporting documents or information. She did not. Therefore, even if Sukljian has evidence of continuous use of her mark, the Board has precluded her from submitting documents or information that she had not produced. Also, the Board's January 28, 2014 Order specifically warned Sukljian that "failure to appear for the noticed deposition may result in entry of judgment against her." *Id.* at p. 8 (emphasis included).

In the Board's June 12, 2014 Order, which granted Petitioner AMH's extension of time to depose Sukljian until June 30, 2014, the Board warned Sukljian that, "[a]s noted in the Board's January 28, 2014 order, Ms. Sukljian is reminded that failure to appear for a noticed deposition may result in entry of judgment against her." Klarberg Decl., Ex. A at p. 3.

Sukljian has clearly disregarded the three (3) most recent Board Orders, without any reasonable justification or explanation. Because Sukljian has blatantly disregarded the Board's directives to produce discovery and refrain from evasive game playing, has caused an unnecessarily protracted proceeding, and most recently, has failed to attend a noticed deposition, any prejudice that Respondent may experience from a default judgment being entered is self-inflicted and more than warranted.

It is by now readily apparent that the threat of such serious sanctions will not make Sukljian fulfill her discovery obligations. Judgment pursuant to Trademark Rule 2.120(g) is certainly permissible at this stage ("If a party fails to comply with an order of the Trademark Trial and Appeal Board relating to disclosure or discovery, including a protective order, the Board may make any appropriate order, including those provided in Rule 37(b)(2) of the Federal Rules of Civil Procedure."). Federal Rule 37(b)(2)(A)(vi) authorizes "rendering a default judgment against the disobedient party." *See also* T.B.M.P. § 527.01(a) ("Default judgment is a harsh remedy, but may be justified where no less drastic remedy would be effective, and there is a strong showing of willful evasion.").

Here, default judgment is not only permissible, but justified. Sukljian has continuously failed to comply with Board Orders and has hampered the reasonable procedures appropriate for resolution of this trademark conflict by various schemes, including, but not limited to, Sukljian's willful evasion during discovery and delay tactics. Any sanction short of judgment would be futile and unfair to Petitioner, as it has been unable, despite diligent efforts, to move this case forward, due to Sukljian's intransigence. *See Patagonia, Inc. v. Azzolini*, 109 U.S.P.Q.2d 1859, 1862 (TTAB 2014) (entering the sanction of judgment against *pro se* respondent and cancelling *pro se* respondent's registration because of the "continuing nature of respondent's violations

despite multiple prior admonitions from the Board.”); *see also Benedict v. Super Bakery, Inc.*, No. 11-1131 (Fed. Cir. Dec. 28, 2011) (on appeal from the TTAB’s prior ruling entering judgment against *pro se* respondent for failure to comply with discovery orders and imposing the sanction of cancellation of his trademark, the United States Court of Appeals for the Federal Circuit affirmed the TTAB’s ruling, finding that the remedy of default judgment was reasonable and appropriate); *Baron Philippe de Rothschild S.A. v. Styl-Rite Optical Mfg. Co.*, 55 U.S.P.Q.2d 1848, 1854 (TTAB 2000) (pattern of dilatory conduct indicated willful disregard of Board’s order and resulted in entry of judgment); *MHW Ltd. v. Simex Aussenhandelsgesellschaft Savelsberg KG*, 59 U.S.P.Q.2d 1477 (TTAB 2000) (repeated failure to comply with Board’s orders and unpersuasive reasons for delay resulted in entry of judgment); *Caterpillar Tractor Co. v. Catfish Anglers Together, Inc.*, 194 U.S.P.Q. 99 (TTAB 1976) (judgment entered where applicant provided no reason for not complying with Board’s order compelling discovery).

Accordingly, AMH respectfully requests that judgment be entered against Sukljian and in favor of AMH in this consolidated proceeding, formerly Cancellation No. 92/055,279 and Opposition No. 91/205,046.<sup>2</sup>

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<sup>2</sup> In the alternative, AMH respectfully requests that the Board, at a minimum, preclude Sukljian from testifying at trial.

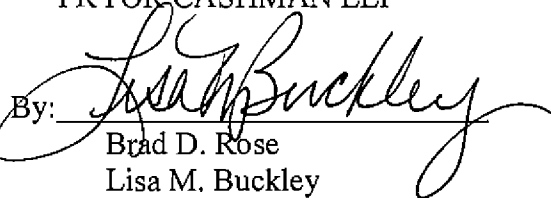
**PRAYER FOR RELIEF**

WHEREFORE, AMH prays that the Board issue an order entering a default judgment against Sukljan sustaining the instant Cancellation Petition and in favor of AMH in the Opposition Proceeding.

Dated: New York, New York  
August 12, 2014

Respectfully submitted,

PRYOR CASHMAN LLP

By: 

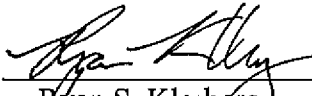
Brad D. Rose  
Lisa M. Buckley  
Ryan S. Klarberg  
7 Times Square  
New York, New York 10036  
(212) 421-4100

*Attorneys for Ate My Heart, Inc.*

**CERTIFICATE OF SERVICE**

I certify that on August 12, 2014, a true and correct copy of the foregoing Petitioner Ate My Heart, Inc.'s Renewed Motion For Default Judgment and Declaration of Ryan S. Klarberg In Support of Petitioner's Renewed Motion For Default Judgment was served by FedEx to Respondent at the following address:

Christina Sukljian  
13 Manor Street  
Albany, NY 12207

  
\_\_\_\_\_  
Ryan S. Klarberg